INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
B. The decisions below	9
Argument	10
Conclusion	12

CITATIONS

Cases:	
Local No. 207, Association of Bridge Workers v. *Perko*, 373 U.S. 701	10
National Labor Relations Board v. *Mackay Radio Co.*, 304 U.S. 333	11
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	11
Statute and regulations:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)	2
Section 7	9
Section 8(a)(1)	10
Section 8(a)(3)	9
29 CFR 102.118(b)	12

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1174

THE ELDER-BEERMAN STORES CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 26) is reported at 415 F. 2d 1375. The Board's decision and order (Pet. App. 28–86) are reported at 173 NLRB No. 68.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1969, and a petition for rehearing was denied on November 14, 1969 (Pet. App. 26, 27). The petition for a writ of certiorari was filed on February 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the findings of the National Labor Relations Board that the company violated Section 8(a)(1) and (3) of the National Labor Relations Act by engaging in various forms of restraint and coercion and by discharging employees because of their union or other protected activity.

2. Whether the Board's procedure was fair and proper.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition (Pet. App. 87–89).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On February 2, 1967, the International Brotherhood of Teamsters, Local Union No. 957, held an organizational meeting among the truckdrivers and helpers of the Company's Apple Street warehouse in Dayton, Ohio (Pet. App. 36; R. 18).[1] At least eight employees attended, all of whom signed authorization cards and paid union dues (Pet. App. 36, n. 4; R. 18, 106–107, 108). On February 3, the Union notified the Company by telegram that it "represented a majority," and on February 6 it filed an election petition with the Board (Pet. App. 36; R. 5–6).

[1] "R." references are to the Appendix to the parties' briefs filed in the court below.

Vice President of Operations Harry Stine brought the Union's telegram to the attention of Charles Graham, the immediate supervisor of the Apple Street warehouse drivers and helpers, and asked him to "keep [his] eyes and ears open and to report anything suspicious to him" (Pet. App. 39; R. 68). Stine explained that since Graham was a Negro he could "get in with these guys because the majority of them were Negroes and [he] could be an inside man for [Stine]." Stine told Graham "to fraternize" with the employees and "[s]ee if [he] could find a list of names." Although Graham agreed to report any information he might discover concerning union activity and was asked for a report each day until mid-April,[2] he failed to furnish any information (Pet. App. 39; R. 69–70). On several occasions, Stine and Superintendent of Warehousing Virgil Hank—the overall supervisor of the Apple Street warehouse and another warehouse on Helena Street—called Graham a "poor supervisor" because of his failure to submit a report of union activity among the employees (Pet. App. 39; R. 73).

In early February, Joseph Rutledge, an employee at the Helena Street warehouse and a brother of John Rutledge, the employee who had instigated the union campaign at the Apple Street warehouse (Pet. App. 36; R. 17), was summoned to Stine's office. When Joseph denied knowledge of the Union's telegram,

[2] On April 13, the Union's election petition was dismissed by the Board's Regional Director for lack of a sufficient showing of interest among the unit employees (Pet. App. 37).

Stine asked him if he would accept a work assignment at Apple Street in order to obtain information for the Company concerning the union activities there. Joseph Rutledge suggested that this was a poor idea because "the fellows" would know why he was there. Stine then asked Joseph if his brother, John, was "in on it" and whether John would tell him anything. Joseph replied that he did not know whether John was involved with the Union, and did not think that John would tell him "anything that might be going on down there." Stine asked Joseph to keep him informed if he "heard anything about the situation" (Pet. App. 38; R. 9–10). About two weeks later, Joseph was again summoned by Stine. He was given a wage increase and was asked if he had heard anything concerning the Union. He said no, and Stine retorted, "You are a poor detective" (Pet. App. 38).

On February 17, President Arthur Beerman called a meeting, during working time, of all the drivers and helpers at the Apple Street warehouse. He stated that the Company had received a telegram from the Union concerning their desire to be represented. He added that he understood "14 or 15 fellows" had paid the Union $17 of their hard-earned money; that if they could spend $17 foolishly to try to get a union in the warehouse, he could spend $17,000 to keep it out; that he was "a fair-minded man" and if they had grievances he could "be reached at any time"; that the employees did not need an outside representative, and, if they had come straight to him instead of going to the Union, he would have made things better for

them; that he knew "there are discrepancies in the pay rate here, and this will all be taken care of," but his "hands are tied right now" because "[a]n election is coming up, and [he] can't do anything about [their] raises until this is over with." Beerman also discussed current Company benefits; the insurance plan, the retirement plan, and the "baby bonus"—gift certificates for Company drivers employed from one to two years, and $550 or more for those employed over two years (Pet. App. 41–42; R. 19–21, 36–37, 43–44, 51, 75).

Executive Vice-President and General Manager Max Gutman, Vice-President Stine, and other Company representatives were present while Beerman spoke to the drivers (Pet. App. 36; R. 19, 36). After Beerman finished, he invited questions from the employees. Employee Bledsoe complained about the overtime, when the employees were instructed to deliver "specials" after they had completed their regular deliveries. Beerman replied, "This will cease * * *. The next time anybody asks you to take anything out after five o'clock, tell them to go to hell, and call me" (Pet. App. 42; R. 21–22, 44). Subsequent to this meeting, the following discharges ensued:

1. John Rutledge, the instigator of the union campaign, was employed by the Company in September 1966 as a driver at the Apple Street warehouse. On his application for employment, Rutledge indicated that he had a police record and a back disability (Pet. App. 47; R. 13–14). Two or three weeks after he was hired, Rutledge was permanently placed on a package

route as a delivery driver. On several occasions, he was commended by various supervisors and was advised that he was "at the top of the list for a raise" (Pet. App. 48; R. 16).

On February 17, 1967, while Vice-President Stine was speaking to Supervisor Graham about the Union, Stine stated that "Rutledge seemed to be the smartest one of them and he had him figured out to be the leader" (Pet. App. 48; R. 70). On February 25, Rutledge was summoned to the warehouse office. In the presence of Warehouse Manager Nicodemus and his assistant, Maxwell, Stine told Rutledge, "John, we have been doing a little review of your application, and due to your police record and back condition the Company can no longer keep you under [our] employment." Rutledge protested that the Company knew of these matters from the time he was hired. Stine replied that there were certain incidents concerning his police record that Rutledge had omitted in his employment application[3] (Pet. App. 48; R. 24, 65–66). Rutledge was discharged effective that day (Pet. App. 48; R. 24).

2. In March 1966, Revoosie Colley was hired by the Company as a driver, with knowledge that he had a previous arrest (Pet. App. 54; R. 35). On Septem-

[3] Stine referred to a fugitive charge which Rutledge did not mention at the time of his hire. The charge grew out of an arrest "for speeding in Germantown, Ohio, in 1951"; Rutledge was "released to return four days later to pay [his] fine"; he "didn't appear and the police picked [him] up two days later and [he] was taken back to Germantown to pay [his] fine" (Pet. App. 49, n. 23; R. 65–66, 208).

ber 2, 1966, Colley and six other Apple Street warehouse employees were arrested. He and employee Coleman were charged with carrying a concealed weapon; at the trial, 6 to 10 weeks later, both were convicted of a misdemeanor and given suspended sentences of 2 months. The Company was apprised of each step of the criminal proceedings, and pertinent notations were placed in Colley's personnel file. Maxwell told Colley "it was good" that the charge was reduced from a felony to a misdemeanor because, otherwise, "it could have meant" his job (Pet. App. 54; R. 38–40, 48–50).

In January 1967, Colley was solicited by John Rutledge to support the Union. On the following day, Colley signed an authorization card and returned it to Rutledge (A. 34). On February 2, Colley attended the union meeting, where he signed another card and paid union dues (Pet. App. 36, n. 4; R. 34). On February 25, Colley was summoned to the warehouse office, where Vice-President Stine advised him that he was discharged because, while employed by the Company and contrary to its policy, he had been arrested. Colley asked why the Company waited "some six months" after his arrest to discharge him. Stine replied, "because higher authorities of the company didn't have any knowledge of [his] arrest" (Pet. App. 55; R. 37–38, 40).

3. On April 25 and 26, five more drivers who had signed union authorization cards—Coleman, Bledsoe, Cameron, Lockett, and Pollard—were discharged (Pet. App. 57, 66–67, 36, n. 4). Thus, on the morning of April 25, management representatives Hank, Nico-

demus, and Maxwell were present at the Apple Street warehouse at starting time, allegedly because the Company had heard that some of the employees were planning a slowdown (Pet. App. 57–58; R. 163, 229). Although the five employees discussed among themselves, for about a half hour, the employee dissatisfaction (Pet. App. 75–76; R. 142–144, 122–123, 129, 163–164), they completed a full day's work in the usual time (Pet. App. 71). Cameron returned to the warehouse from an unfamiliar route at about 4:30 p.m., with only 4 packages remaining out of more than 20 furniture deliveries (Pet. App. 68; R. 59). Lockett delivered 137 packages, returning to the warehouse at approximately 5:30 p.m. with only 3 packages (Pet. App. 67; R. 109–110). Bledsoe and helper Pollard completed 35 to 40 furniture deliveries, returning to the warehouse at approximately 7 p.m. (R. 91–92, 103).

Cameron, Coleman, and Lockett were discharged when they returned to the warehouse. Each was told by Stine that he was discharged, "Because of what happened this morning, and evidently you are unhappy with the company, so the company is evidently unhappy with you, and you are terminated" (Pet. App. 66–67; R. 61). Pollard and Bledsoe were discharged by Stine the following morning when they reported to work (Pet. App. 66; R. 88–89, 101–102).

4. Earlier in the afternoon of April 25, Supervisor Graham was summoned to Manager Nicodemus' office and, in the presence of Superintendent Hank, was discharged by Vice-President Stine. He also was told

that he was being terminated because of "what happened this morning" and because of his evident unhappiness with the Company. (Pet. App. 66–67; R. 75–76, 201.)

B. THE DECISIONS BELOW

The Board found that the Company restrained and coerced its employees in violation of Section 8(a)(1) of the Act by interrogating employee Joseph Rutledge about union activity; by asking him to spy on such activity (Pet. App. 29, 39–40); and by President Beerman's speech of February 17, promising the employees benefits if they rejected the Union and dealt directly with him (Pet. App. 30, 45–47). The Board further found that the Company violated Section 8(a)(3) by discharging Rutledge and Colley, not because of their newly discovered criminal records, but because of their union adherence (Pet. App. 29, 47–57). The Board also found that there had been no slow-down on April 25 (Pet. App. 71), but that the Company, in violation of Section 8(a) (3) and (1), had discharged employees Coleman, Bledsoe, Cameron, Lockett, and Pollard because of their union activity and because they had expressed dissatisfaction with employment conditions during the morning of April 25—activity protected by Section 7 of the Act (Pet. App. 29–30, 73–74, 75–76). Finally, the Board found that Supervisor Graham was discharged because he refused to engage in surveillance for the Company so that it could discover the identity of union adherents, and that, in these circumstances, the instructions to Graham and his discharge interfered

with employee rights in violation of Section 8(a)(1) of the Act (Pet. App. 30–31).

The Board ordered the Company, *inter alia,* to offer the discharged employees reinstatement with backpay, to cease the unlawful activities found, and to post appropriate notices (Pet. App. 80–84). The court of appeals, in a *per curiam* order, found the Board's decision to be supported by substantial evidence and enforced its order in full (Pet. App. 26).

ARGUMENT

1. Many of the questions raised by petitioner are not presented on this record. Thus, petitioner's contention that Supervisor Graham and the five drivers were lawfully discharged is based on its premise that they participated in a slowdown (Pet. 20–23); however, the Board found (Pet. App. 71, 73-76), and the court of appeals sustained its finding, that there was no slowdown and that these individuals were discharged because of their union and concerted activity.[4] Similarly, petitioner's contention (Pet. 23–24) that President Beerman's speech merely entailed a discussion of certain benefits is contrary to the Board's finding (Pet. App. 45–47), which the court of appeals ac-

[4] It is well settled that an employer violates Section 8(a)(1) of the Act by discharging a supervisor because he refuses to engage in surveillance or other conduct which would restrain employees in the exercise of their organizational rights, and that the Board is empowered, as a remedy for that unfair labor practice, to order the supervisor reinstated. *Local No. 207, Assoriation of Bridge Workers* v. *Perko*, 373 U.S. 701, 707.

cepted, that, in the context of Beerman's antagonism to the Union, his remarks were coercive and designed to induce the employees to abandon the Union and bargain directly with him. Petitioner's challenge to these findings thus presents only evidentiary issues, which do not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

2. Petitioner's allegations of procedural unfairness similarly raise no issues warranting further review. Although the complaint (R. 256) did not specifically allege that the discharge of the five drivers was due to their concerted protest over employment conditions as well as their union activity, the former issue was litigated at the hearing (R. 62–63, 55), and dealt with by petitioner in its brief to the Trial Examiner (pp. 33-34). Since the issue was thus tried by the parties, the Board, contrary to petitioner's contention (Pet. 14–16), properly based a finding on it even though it had not been specifically pleaded. *National Labor Relations Board* v. *Mackay Radio Co.,* 304 U.S. 333, 349–350. Nor was petitioner prejudiced (see Pet. 12–14) by the Board's refusal to name Joseph Rutledge and Graham in the complaint as the employees whom Vice-President Stine was alleged (R. 255) to have interrogated concerning the union activities of other employees. Petitioner knew that Stine's activities were in question and clearly could have obtained from him detailed knowledge of his conduct; significantly, petitioner at no time explained how it was handicapped

in preparing its defense by not knowing the employees' identity before the hearing.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

MARCH 1970.

---

[5] In order to protect employees against reprisals, the Board ordinarily does not identify employees who have been restrained or coerced until they have been called to testify at the hearing. It does specify the date on which the alleged unfair labor practice occurred and the management representative involved. A similar policy is followed with respect to the employees' pre-trial statements. See 29 CFR 102.118(b)(1).

U.S. GOVERNMENT PRINTING OFFICE: 1970